Lord Dunedin, also in the majority, agreed with Viscount Cave. Viscount Finlay and Lord Wrenbury who were in the minority took the view that by reason of the fourth condition in the policy the misstatement would not be material to render the policy void. The fourth condition of the policy in *Dawsons'* case, *supra,* was in these terms:

"Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or connection with any claim, shall render the policy void."

Fortunately in our case there is no condition similar to the fourth condition which influenced the minority judgment in *Dawsons'* case. On the other hand, condition 9 of the policy in the instant case makes it abundantly clear that the truth of the statements and the answers in the proposal form is a condition precedent to any liability of the appellant company to make any payment under the policy. The condition reads:

"9. The due observance and fulfilment of the Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

The principle which was applied in *Dawsons'* case *supra,* in my respectful opinion, must likewise apply to the present case. In *Newsholme Brothers* v. *Road Transport and General Insurance Company, Limited*[2] Scrutton, L.J. had the same principle in mind when he said on page 376 this:

"... In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, "and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

Applying the principle to this case as I do, I cannot escape the conclusion that this appeal must be allowed. Needless to say that I have come to this view with some reluctance and in the words of Viscount Cave that although one would have little sympathy with an insurance company who are seeking to profit by mistake contributed by their agent the case has to be decided according to law and the law happens to be on their side.

Accordingly I agree with the learned Lord President that this appeal be allowed with costs here and below.

*Appeal allowed.*

Solicitors: *Triptipal Singh & Co.; Lim Ewe Hock.*

## *RE* MAMAT BIN DAT SAN & ANOR.; MEK SOM v. AWANG BIN SENIK

**[F.C. (Suffian, Ali and H.S. Ong F.JJ.) October 19, 1971]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 89 of 1970]**

*Small Estates — Distribution — Consent order — Distribution with consent of beneficiaries — Consent of unsound mind beneficiary given by guardian — Small Estates (Distribution) Ordinance, 1955, ss. 10 and 15.*

The plaintiffs applied to the court for a declaration that the order of distribution of an estate made by the Collector of Land Revenue was null and void. It was alleged that a share in the estate was given to a non-beneficiary. It appeared that all the beneficiaries had consented to the order of distribution, the consent of one of the beneficiaries who was of unsound mind having been given by his guardian appointed by the collector.

**Held,** dismissing the appeal: as the order of distribution had been made by consent it was binding on the beneficiaries.

*Case referred to:-*

(1) *Wilding* v. *Sanderson* [1897] 2 Ch. 534 at p. 543.

FEDERAL COURT.

*H. L. Wrigglesworth* for the appellants.

*Dato' Isahak bin Abdul Hamid* for the respondent.

In the court below *N. Chan* and *Phillip Leong* appeared for the plaintiffs, and *Dato' Isahak bin Abdul Hamid* for the defendant. The following grounds of judgment were delivered on August 5, 1970:

**Ibrahim J.:** In this action the plaintiffs were asking the court for a declaration that the order of distribution of the collector of Pasir Mas in Distribution Suit No. 102 of 1950 dated 18th May 1957 in respect of Lot 119 Mukim Rantau Panjang, District of Pasir Mas (now known as Lots 223 and 224 held under grant No. 8452) was null and void and to set aside the said order.

The statement of claim was amended several times and as finally amended paragraph (11) thereof on which ultimately the action was solely based reads as follows:

"(11) The Collector of Pasir Mas acted *ultra vires* when he ordered on 18th May, 1957 that the ½ undivided share in the said land be distributed among Awang bin Senik, Samat bin Che Omar and Mek Som binti Bulat equally, when Awang bin Senik was not a beneficiary of the estate of Mamat bin Dat San."

The defendant had contended that since the plaintiffs had a right of appeal under section 29 of the Small Estates (Distribution) Ordinance No. 34 of 1955 and they had not exercised that right they were precluded from bringing this action. As it was the defendant's case all along that the collector's order of distribution was made with the agreement and assent of all the beneficiaries and was therefore a consent order it would not be necessary for me to deal with this matter at great length. I did not agree with the defendant's contention and would in this connection cite the judgment of Byrne J. in *Wilding* v. *Sanderson*[1] where his Lordship in reference to a consent judgment or order said: —

"It must, when once it has been completed, be obeyed, unless and until he can get it set aside in proceedings duly constituted for the purpose."

The relevant facts were not in dispute and the disposal of this action depended on the construction of certain provisions of the said Ordinance.

The collector first heard the said Distribution Suit No. 102 of 1950 in respect of the estate of the deceased Mamat bin Dat San of which Lot 119 in question formed a part on 14th January 1957 but no order was then made. He re-heard it on 11th February 1957 and the record of this hearing, a copy of which appears at page 10 of the agreed bundle of documents (exhibit A), reads as follows:

" *Re-hearing of dispute*

Dated 11/2/57 D/S.102/50

*Re* estate of Mamat bin Dat San.
Assets: $3,154.65.

Resp. Present:
Awang bin Senik (purchaser) 1/3 lot 119(½)

Benef. of Bulat:
Mek Som binti Bulat
Bidah binti Bulat
Haminah binti Bulat
Che Mek binti Che Man (widow of Bulat)

Benef. of Che Omar:
Samat bin Che Omar
Che Mas binti Che Omar
Pa'Yih bin Che Omar
Che Wa binti Che Omar
Jusoh bin Che Omar
Hussin bin Che Omar
Jeriah binti Che Omar
Mek Mas binti Mehat (widow of Che Omar) unsound mind).

Samat is appointed guardian for Mek Mas.

All *waris* present pray the estate be distributed in equal undivided shares as follows:—

Scheme/Distribution

DM.121 lot 119 to
Awang bin Senik i/c Kn.83500 (1/3) share
Samat bin Che Omar 270017 (1/3) share
Mek Som binti Bulat 81881 (1/3) share.

S.I. lot 162 to
Mek Som binti Bulat ½
Samat bin Che Omar ½

S.I. lot 94 to
Mek Som binti Bulat ½
Samat bin Che Omar ½

This scheme of distribution is subject to payment by Samat to Mek Som of a sum of $550/- as *chuchoran* on 18/2/57. We agree to the scheme of distribution above.

| | | | |
|---|---|---|---|
| X<br>RTP. of<br>Mek Som | X<br>RTP. of<br>Bidah | X<br>RTP. of<br>Haminah | X<br>RTP. of<br>Che Mek |
| X<br>RTP. of<br>Samat | X<br>RTP. of<br>Che Mas | X<br>RTP. of<br>Pa'Yih | X<br>RTP. of<br>Che Wa |
| X<br>RTP. of<br>Jusoh | X<br>RTP. of<br>Hussin | X<br>RTP. of<br>Jeriah | X<br>absent<br>RTP. of<br>Mek Mas. |

Before me,
T. Ya'acob
11.2.57."

Page 11 of "A" shows that the $550 had been paid on 18th February 1957 by Samat and kept in deposit in the name of Mek Som and at page 1 of "A" it is shown that the collector's order of distribution was presented to and registered by the Land Registrar on 18th May 1957.

Though in the record the word 'purchaser' was written in brackets after the name of Awang bin Senik (the defendant) it was common ground that he was not in fact a purchaser within the meaning of that term as defined in section 2 of the said Ordinance and that the order of distribution was made by the collector in the purported exercise of his powers under section 15 of the said Ordinance, the relevant sub-sections (1) and (2) of which read as follows:

"15.(1) Where the Collector is satisfied that all the beneficiaries of the estate being of full age and capacity have agreed between themselves as to the manner in which the estate should be distributed, the Collector may, after recording in the distribution order the terms of the agreement, and the assent of the parties thereto, distribute the estate in the manner provided for by the agreement unless it shall appear to the Collector to be unjust or inequitable so to do.

(2) Where any such agreement has been entered into by all the beneficiaries who are of full age and capacity the Collector may, if in his opinion it is in the interests of any other beneficiary who is a minor or a person not of full capacity to do so, assent to the agreement on behalf of such minor or person and may thereupon after recording the terms of the agreement and the assent of the parties thereto and of his own assent on the part of such minor or person distribute the estate in the manner provided for by the agreement."

It was also common ground that the defendant was not a beneficiary and it was contended by the plaintiffs that the collector's order of distribution was null and void because part of the estate was distributed to the defendant. In support of this contention the plaintiffs relied on section 13(1) of the said Ordinance which provides that at the conclusion of the hearing the collector, after ordering certain provisions to be made out of the estate, "shall distribute the residue of the estate according to their respective shares and interests among the beneficiaries . . . ".

Section 13(1), however, as stated therein, is "subject to the provisions of section 15" and there is nothing in the said section 15(1) to suggest that the collector could not distribute the estate to a non-beneficiary "in the manner provided for in the agreement" when all the beneficiaries had agreed and assented to that distribution except in cases where it appeared to the collector to be "unjust or inequitable so to do".

The record also shows that one of the beneficiaries was of unsound mind and it was further contended by the plaintiffs that since the collector had not himself assented to the agreement on behalf of the said beneficiary the order he made was null and void on the ground that the provisions of the said section 15(2) had not been complied with. The record, however, goes on to show that another beneficiary had been appointed by the collector to be guardian of the said beneficiary and that all *waris* (beneficiaries) had agreed and assented to the scheme of distribution. Appointment of a guardian by the collector is provided for by section 10 of the said Ordinance sub-section (1) of which reads as follows: —

"10.(1) Where any person, who is named in the petition as a beneficiary of or claimant to the estate or any interest therein or who appears to the Collector to be interested in the distribution of the estate, is or appears to the Collector to be a minor or a person of unsound mind the Collector may, by an order in writing, appoint some suitable and proper person to be the guardian of such minor or person of unsound mind for the purposes of all proceedings for the distribution of the estate under this Ordinance and all such proceedings shall be as effective and binding upon all persons concerned

as if such person had not been a minor or person of unsound mind."

In my view the said section 15(2) should be read together with the said section 10(1) and as the said beneficiary's guardian had entered into the agreement with the other beneficiaries and assented to the scheme of distribution it would not be necessary for the collector to have himself assented on behalf of the said beneficiary. Such an assent would only be required if no guardian had been appointed for the said beneficiary.

I therefore dismissed the action with costs.

*Against the above judgment the plaintiff appealed to the Federal Court.*

**Suffian F.J.** (delivering the judgment of the court): We dismissed this appeal and now give our reasons

Mamat bin Dat San, the deceased, died in 1927 owning a half undivided share in Lot 119 in the Mukim of Rantau Panjang in the District of Pasir Mas, Kelantan.

He left two sons, Bulat bin Mamat and Che Omar bin Mamat.

Bulat died in 1943, leaving four children: Mek Som (the plaintiff and appellant before us), Bidah, Aminah and Awang.

Che Omar died in 1945, leaving a widow and some children including Samat.

Nothing was done to distribute Mamat bin Dat San's estate until 14th January, 1957, when the matter came up before the collector, the estate being a small estate. As it happened, no order was made then, and the matter was re-heard on 11th February, 1957, when the collector ordered among other things that a stranger Awang bin Senik, described in the collector's notes as a purchaser, should get a third share in the land.

Thereafter, in due course the plaintiff, that is the deceased's granddaughter, became the administratrix of her grandfather's estate and of her brother Awang's, he having died on 10th July, 1951. In that capacity she in 1966 sued Awang bin Senik, the so-called purchaser, and asked the High Court to declare that the collector's order in the defendant's favour was null and void. It will be observed that she could, under section 29 of the Small Estates (Distribution) Ordinance 1955, have appealed against the collector's order to the High Court, but did not do so, and instead chose to bring this suit.

The trial did not pursue a smooth course, and there were amendments to the statement of claim, changes of counsel and several adjournments. Finally Mr. Chan appeared for her at the trial. It is clear from the notes made by the learned judge that at that trial there was only one issue, namely, a question of law raised by the amended paragraph 11 of the statement of claim. That paragraph alleges —

"The Collector of Pasir Mas acted *ultra vires* when he ordered on 18th May, 1957 that the ½ undivided share in the said land be distributed among Awang bin Senik, Samat bin Che Omar and Mek Som binti Bulat equally, when Awang bin Senik was not a beneficiary of the estate of Mamat bin Dat San."

Mr. Wrigglesworth for the plaintiff put forward many arguments before us, but we were of the opinion that it was not open for him to depart from the pleadings and raise other issues. These issues should have been raised in the High Court, and if they had been raised then, the defendant might have called evidence to meet these issues. For instance, Mr. Wrigglesworth wanted to submit that the collector's order was void because one of the beneficiaries, Awang bin Bulat, did not consent to it as he had by the time of the hearing before the collector died and no personal representative had been appointed for his estate. It is true that this point had been raised by the plaintiff's statement of claim, and the assistant collector called for the plaintiff said in evidence that the record of the hearing did not show that Awang bin Bulat was present then. But when Mr. Chan closed his case in the High Court he announced that there was only one issue, namely, the one raised by paragraph 11 of the amended statement of claim, whereupon counsel for the defendant decided not to call any evidence in rebuttal, and no wonder there was no finding by the learned judge on this point.

The learned judge decided in favour of the defendant simply on the record of the collector from which he came to the conclusion that all the parties concerned had consented to the order made by the collector. With respect we agreed with him, and accordingly dismissed this appeal.

*Appeal dismissed.*

Solicitors: *Wrigglesworth & Co.; Isahak Hamid & Co.*

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## MOHAMED BIN MUSA v. DEPUTY PUBLIC PROSECUTOR (No. 2)

**[F.C. (Suffian, Ali and Ong Hock Sim FJJ) October 19, 1971]**

**[Kuala Lumpur — Federal Court Criminal Appeal No. 15 of 1971]**

*Criminal Law and Procedure — Appeal — Jurisdiction of Federal Court — Courts of Judicature Act, 1964, ss. 50, 64, 65 and 66.*

The appellant appealed against the order of Ibrahim J. (reported at p. 49, *ante*) who had dismissed an application by the appellant to be permitted to see and inspect the exhibit before the trial.

**Held,** striking out the appeal: as the appellant had not been convicted and as the matter was not brought to the Federal Court under any of the provisions of sections 64, 65 or 66 of the Courts of Judicature Act, 1964, the Federal Court had no jurisdiction to hear and determine the appeal.

FEDERAL COURT.

*C. Jegathesan* for the appellant.

*Gunn Chit Tuan* (Deputy Public Prosecutor) for the respondent.

**Suffian F.J.:** We struck out this appeal because we had no jurisdiction to entertain it.

Our appellate criminal jurisdiction is governed by the Courts of Judicature Act, 1964. Section 50(1)